No. 90357-3

SUPREME COURT OF THE STATE OF WASHINGTON

DARLA KECK and RON JOSEPH GRAHAM, husband and wife, and DARLA KECK and RON JOSEPH GRAHAM as parents for the minor child, KELLEN MITCHELL GRAHAM, and KELLEN MITCHELL GRAHAM, individually,

Respondents/Cross-Petitioners,

vs.

CHAD P. COLLINS, DMD, PATRICK C. COLLINS, DDS; COLLINS ORAL & MAXILLOFACIAL SURGERY, P.S., a Washington corporation, and SACRED HEART MEDICAL CENTER, a Washington corporation,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

I.) INTRODUCTION

Chad P. Collins, DDS, and his son, Patrick C. Collins, DMD, operated on Darla Keck (Keck) for sleep apnea, performing a number of surgical procedures to enlarge her breathing airway by cutting and repositioning her upper and lower jaw bones and muscles. After surgery, it became apparent that the surgical wound was infected and the jaw bones were not healing. Over the next seven months, Keck had four more surgeries. Throughout her treatment, the doctors failed to adequately address the problems with infection and non-union of her jaw bones. As a consequence, Keck suffers from pain, swelling, fatigue, acrid taste in her mouth, nerve sensations in her eye, and numbness in her cheek and chin, among other things. Keck, along with her husband and son, have brought claim for medical negligence against the doctors and their employer, Collins Oral & Maxillofacial Surgery, P.S. (Collins).[1]

[1] The underlying facts are described in more detail in Keck's briefing and the Court of Appeals decision. *See* Keck App. Br., at 4-14 & Appendix; Keck Ans. to Pet. for Rev., at 2-10; *Keck v. Collins*, 181 Wn. App. 67, 73-78, 325 P.3d 306, *rev. granted*, — Wn. 2d —, 335 P.3d 941 (2014).

II.) SUPPLEMENTAL STATEMENT OF THE CASE

A.) The superior court dismissed Keck's medical negligence claim on successive motions for summary judgment, after striking one of her expert affidavits, denying a continuance pursuant to CR 56(f), and denying her motion for reconsideration.

On December 20, 2012, Patrick Collins filed a motion for summary judgment seeking dismissal of Keck's claim. CP 21-22. The hearing on the motion was unilaterally scheduled for a date when Keck's counsel was unavailable and had to be stricken. RP 12-19:22; CP 75, 115. The motion was subsequently re-noted for March 30, 2012, again without checking the availability of Keck's counsel. CP 33-34, 75, 115; RP 12:24-13:2. Under CR 56 and local court rules, the deadline for responding to the motion was March 16, 2012. In the meantime, Keck's counsel, a solo practitioner with an office in Spokane, began a medical negligence trial in Ephrata lasting from March 7 until March 20, 2007. CP 76; RP 13:3-5.

On March 14, 2012, Chad Collins filed a non-substantive "joinder" in Patrick Collins' motion for summary judgment. CP 35-36. The joinder document does not specify whether he was seeking dismissal of Keck's claims against Patrick Collins, himself, or both. When he filed the joinder, counsel for Chad Collins was participating in the same trial as Keck's counsel. CP 76.

On March 16, 2012, while still in the middle of the out-of-town trial, Keck's counsel attempted to respond to the summary judgment motion filed by Patrick Collins, submitting a brief response and a declaration from a previously disclosed expert witness, Kasey Li, MD. CP 38-43; RP 13:6-13. Dr. Li is a board-certified physician in otolaryngology and oral surgery, a member of the faculty of Stanford Hospital, and the founder of the Sleep Apnea Surgery Center. CP 41. Chad Collins had previously attempted to retain Dr. Li as an expert witness for the defense of Keck's lawsuit. CP 195.

Dr. Li is familiar with the standard of care applicable to treatment of sleep apnea in the State of Washington. CP 42-43. He reviewed Keck's medical records and concluded that Collins had violated the standard of care, causing a prolonged course of recovery, additional surgical procedures, and ongoing problems for Keck. *Id.*

Presumably because of the haste in which Dr. Li's declaration had to be prepared, it was phrased solely in terms of Chad Collins, who had merely joined Patrick Collins' motion for summary judgment. CP 43. On March 22, 2012, Keck's counsel obtained a second affidavit from Dr. Li,

essentially an erratum, confirming that Dr. Li's opinions applied to Patrick Collins as well. CP 44-48.[2]

On March 26, 2012, Patrick Collins filed a reply in support of his summary judgment motion, and the next day Chad Collins filed a "reply" in support of his joinder. CP 55-67. Neither doctor objected to the qualifications of Dr. Li or the foundation for his opinions, nor did they dispute his conclusions.[3] Instead, they argued that Dr. Li's testimony regarding breach of the standard of care was not sufficiently specific to avoid summary judgment. CP 57-59, 65-66.

On March 29, 2012, Keck submitted a third affidavit from Dr. Li, reiterating his opinions and providing additional detail. CP 80. While indicating his belief that the first two affidavits from Dr. Li were sufficient, Keck's counsel explained that the third affidavit was submitted to address the doctors' arguments about the sufficiency of the prior affidavits. CP 76; RP 13:14-19. The doctors objected to the third affidavit of Dr. Li as untimely, and Keck's counsel requested a brief continuance

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[2] While CR 56 is phrased in terms of "affidavits," a declaration signed in accordance with RCW 9A.72.085 is deemed to be equivalent. The first declaration of Dr. Li, filed on March 16, 2012, does not appear to satisfy all the formal requirements of RCW 9A.72.085, but there was no objection to the form of the declaration in the superior court and any deficiency was remedied by the second affidavit filed on March 22, 2014.

[3] Patrick Collins did not submit any evidence in support of his motion for summary judgment, but instead relied on *Young v. Key Pharms., Inc.*, 112 Wn. 2d 216, 770 P.2d 182 (1989), to compel Keck to come forward with expert testimony establishing breach of the standard of care and causation of her injuries. CP 23-31.

pursuant to CR 56(f) to permit consideration of the affidavit. CP 76; RP 14:15-19. He explained that he did not have sufficient time to obtain the more detailed testimony while in the middle of another trial. CP 76-77; RP 14:22-15:22.

In ruling on summary judgment, the superior court parsed Keck's medical negligence claim into what it characterized as negligent post-operative care and negligent referral. With respect to negligent post-operative care, the court granted partial summary judgment after striking the third affidavit of Dr. Li as untimely, denying a CR 56(f) continuance to consider the affidavit, and finding the first two affidavits of Dr. Li insufficient. CP 100-04. The court also denied Keck's motion for reconsideration regarding negligent post-operative care. CP 308-10.[4] With respect to negligent referral, the superior court initially denied summary judgment, but later dismissed the Keck's claim in its entirety on a renewed motion. CP 354-61.[5]

[4] The superior court also dismissed Keck's claim to the extent it was based on the initial surgery or a lack of informed consent in addition to negligent post-operative care. CP 96-99.

[5] Dr. Li submitted a fourth affidavit in response to the renewed motion for summary judgment. CP 258-64. All four affidavits are reproduced in the Appendix to Keck's opening brief in the Court of Appeals.

B.) The Court of Appeals reversed summary judgment on multiple grounds, holding the superior court erred by striking Keck's expert affidavit and abused its discretion by denying her motions for continuance and reconsideration.

The Court of Appeals reversed the superior court in all respects. *See Keck,* 181 Wn. App. at 73. First, the appellate court held that the superior court erred in striking the third affidavit of Dr. Li under a de novo standard of review. *See id.* at 78-87. Second, the court held that the superior court abused its discretion in denying a CR 56(f) continuance to consider the third affidavit of Dr. Li. *See id.* at 87-89. Third, after noting that Keck's claim could not be subdivided into negligent post-operative care and negligent referral, the court held that the superior court erred in granting summary judgment because there are disputed issues of material fact regarding the claim. *See id.* at 91-93. Fourth, and finally, the court held that the superior court abused its discretion in denying Keck's motion for reconsideration. *See id.* at 93-94.[6]

C.) Chad and Patrick Collins limited their petition for review to the standard of review regarding the timeliness of summary judgment affidavits.

The doctors raise two related issues involving the standard of review for superior court rulings regarding the timeliness of summary

[6] The concurrence disagreed only with the first holding regarding the standard of review of the order striking Dr. Li's third affidavit. *See Keck,* 181 Wn. App. at 94 (Korsmo, J., concurring; stating "the majority correctly reverses and remands this case because plaintiff's counsel was entitled to more time to prepare his response to summary judgment motions").

judgment affidavits. *See* Collins Pet. for Rev., at 2. The petition does not raise any issues related to the other holdings of the Court of Appeals, in particular its conclusions that the superior court abused its discretion in denying Keck's motions for a CR 56(f) continuance and reconsideration and erred in granting summary judgment.[7]

D.) The Court granted Keck's cross petition for review regarding the standard for evaluating the sufficiency of expert affidavits submitted in opposition to summary judgment in medical negligence cases.

In the superior court and on appeal, Collins' has cited *Guile v. Ballard Comm. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d 689, *rev. denied sub nom. Guile v. Crealock,* 122 Wn. 2d 1010 (1993), to support an argument that Dr. Li's affidavits are not sufficiently specific to withstand summary judgment.[8] The superior court expressly relied on *Guile* in discounting the first two of Dr. Li's affidavits (as the third was struck) and entering the initial partial summary judgment order in favor of Collins. CP 102.

Keck has argued that Dr. Li's affidavits are sufficient to withstand summary judgment, and that *Guile* should be overruled to the extent that it requires greater specificity from expert affidavits submitted in opposition

[7] The petition includes argument that the de novo standard of review for rulings regarding the timeliness of summary judgment affidavits would create an incongruity with CR 56(f), but does not raise any issue with respect to the Court of Appeals' holding under CR 56(f). *See* Collins Pet. for Rev., at 17-18.

[8] *See* CP 57-58 (Patrick Collins reply in support of initial summary judgment motion); CP 332, 334 (Chad Collins reply in support of renewed summary judgment motion); Patrick Collins Resp. Br., at 14-16; Chad Collins Resp. Br., at 19-27.

to summary judgment in medical negligence cases than is necessary to admit the expert's testimony at trial or support a verdict. *See* Keck App. Br., at 15, 20-25; Keck Reply Br., at 12-25. The Court of Appeals declined to overrule *Guile*, but this Court accepted cross review of this issue. *See Keck,* 181 Wn. App. at 91; Keck Ans. to Pet. for Rev., at 2, 14-15; Order Granting Review, *Keck v. Collins,* Wn. S. Ct. No. 90357-3, Oct. 8, 2014.

III.) SUPPLEMENTAL ARGUMENT

A.) Regardless of the standard of review that applies to rulings regarding the timeliness of summary judgment affidavits, the Court of Appeals decision should be affirmed based on unchallenged holdings that the superior court abused its discretion by denying a CR 56(f) continuance and reconsideration of the summary judgment order, and that there is a genuine issue of material fact for trial regarding Keck's medical negligence claim.

RAP 13.7(b) provides in pertinent part: "[i]f the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the ... the petition for review and the answer, unless the Supreme Court orders otherwise upon the granting of the motion or petition." (Brackets & ellipses added.) The failure to raise other issues addressed by the Court of Appeals deprives the Court of adequate briefing and precludes further review. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851, 859, 281 P.3d 289 (2012) (declining to address issues decided by the Court of Appeals but not raised in petition for review or answer); *Cedar River Water & Sewer Dist. v.*

King County, 178 Wn. 2d 763, 789 n.14, 315 P.3d 1065 (2013) (stating rationale for RAP 13.7(b) in terms of depriving the court of valuable briefing). The Court of Appeals' resolution of these issues therefore comprises the law of the case. *See Scott Fetzer Co. v. Weeks,* 114 Wn. 2d 109, 112 n.2, 786 P.2d 265 (1990).

Here, the questions raised in the petition for review are limited to the standard of review for lower court rulings regarding the timeliness of summary judgment affidavits. The Court of Appeals' decisions regarding the CR 56(f) continuance, reconsideration and summary judgment are not before this Court and are the law of the case. The lower court's decisions on these issues are independently sufficient to require reversal and remand, regardless of how the Court resolves the questions presented by Collins' petition for review.[9]

B.) As with other summary judgment rulings, this Court should review the timeliness of summary judgment affidavits de novo, and confirm that the superior court erred in striking the third affidavit of Dr. Li.

In *Folsom v. Burger King,* 135 Wn. 2d 658, 663, 958 P.2d 301 (1998), this Court stated:

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[9] Based on the limited nature of the petition for review, in particular Collins' failure to raise any issues regarding the Court of Appeals' decision that the superior court abused its discretion in denying Keck's motion for a CR 56(f) continuance, Keck did not seek cross review regarding the standard of review applied to rulings on such continuances. *See* Keck Ans. to Pet. for Rev., at 12 n.4. Keck argued below that the de novo standard should apply, but the Court of Appeals applied the abuse of discretion standard. *See* Keck App. Br., at 16-17; Keck Reply Br., at 2-8; *Keck*, 181 Wn. App. at 82-83.

> The de novo standard of review is used by an appellate court when reviewing *all* trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, and the standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court.

(Citations omitted; emphasis added.)[10] While *Folsom* involved review of evidentiary rulings made in connection with a summary judgment motion, the Court of Appeals below properly concluded that *"all" means all* in applying *Folsom* to rulings regarding the timeliness of summary judgment affidavits. The language of *Folsom* referring to "all trial court rulings" should be considered part of the holding of the case and given stare decisis effect. The statement of a rule of law is precedential, even if it is not applicable under the circumstances of the case.[11] The Court knows how to limit its holdings to the facts of a particular case, but did not do so in *Folsom*.[12]

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[10] *Accord Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn. 2d 413, 416, 150 P.3d 545 (2008) (citing *Folsom* for the proposition that "[t]rial court rulings in conjunction with a motion for summary judgment are reviewed de novo").

[11] *Cf. State ex rel. Lemon v. Langlie*, 45 Wn. 2d 82, 90, 273 P.2d 464 (1954) (stating "[e]ven though we held [in a prior case] that he had not shown compliance with the rule, the statement of this legal principle was still necessary to the decision reached," and holding that the statement of the inapplicable legal principle was "controlling" as precedent in a subsequent case).

[12] *Cf. Brown v. MHN Gov't Servs., Inc.*, 178 Wn. 2d 258, 261-62, 306 P.3d 948 (2013) (stating "[w]e note that our holdings are limited to the facts of this case"); *In re Det. of G.V.*, 124 Wn. 2d 288, 297, 877 P.2d 680 (1994) (stating "[w]e take care to note ... that our holding is limited to the facts of these cases"); *In re Esparza*, 118 Wn. 2d 251, 265, 821 P.2d 1216 (1992) (stating "[w]e emphasize that our analysis and holding ... are limited to the facts and questions certified and the arguments presented"); *Douchette v.*

The rationales of *Folsom* apply to rulings regarding the timeliness of summary judgment affidavits to the same extent as rulings regarding the admissibility of such affidavits. *See Keck,* 181 Wn. App. at 81. The de novo standard of review is grounded in the requirements to view the record in the light most favorable to the nonmoving party and to conduct the same inquiry as the trial court on review of summary judgment. *See Folsom,* 135 Wn. 2d at 663. The abuse of discretion standard of review is incompatible with these requirements.[13] The degree of deference involved in applying this standard is tantamount to viewing the record in the light most favorable to the lower court rather than the nonmoving party.[14] Furthermore, a reviewing court does not conduct the same inquiry as the lower court, and cannot reverse simply because it disagrees with the lower court's decision.[15] In light of the language and rationales of the *Folsom*

Bethel Sch. Dist., 117 Wn. 2d 805, 816, 818 P.2d 1362 (1991) (stating "[o]ur holding today is limited to the facts of the case").

[13] *See generally* Kelly Kunsch, *Standard of Review (State and Federal): A Primer,* 18 Seattle Univ. L. Rev. 11, 34-37 (1994) (regarding abuse of discretion standard of review, noting appellate courts' extreme reluctance to find an abuse of discretion).

[14] *See, e.g., Scott v. Trans-Sys., Inc.*, 148 Wn. 2d 701, 708, 64 P.3d 1 (2003) (indicating factual basis for exercise of discretion is reviewed for substantial evidence); *Marriage of Littlefield,* 133 Wn. 2d 39, 47, 940 P.2d 1362 (1997) (indicating the exercise of discretion must be based on factual findings that are supported by the record).

[15] *See, e.g., Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn. 2d 544, 548, 647 P.2d 30 (1982) (lead opinion, stating "[w]hile we, as did the Court of Appeals, might have reached a different conclusion, after examining the entire record we find the trial court ... did not abuse its discretion"); *Kehus v. Euteneier,* 59 Wn. 2d 188, 193, 367 P.2d 27 (1961) (stating "[e]ven though this court might have reached a different conclusion if it had been charged initially with the responsibility of deciding this difficult question, nevertheless, we are quite convinced from our examination of the entire record that the trial court did not manifestly abuse its discretion").

decision, the case cannot be distinguished on grounds that it involved the admissibility rather than the timeliness of summary judgment affidavits.[16]

Under the abuse of discretion standard of review, the reviewing court must find that the lower court decision is manifestly unreasonable or based on untenable grounds. *See Magaña v. Hyundai Motor America,* 167 Wn. 2d 570, 582-83, 220 P.3d 191 (2009). In applying this standard to the exact same set of circumstances, the reviewing court could conclude that a lower court has discretion *either to strike or not to strike* a tardy summary judgment affidavit. In this way, the abuse of discretion standard of review can lead to dissimilar treatment of similarly situated parties and inconsistent—often outcome determinative—results.

Normally, the abuse of discretion standard of review is warranted "when (1) concerns of judicial economy dictate that the trial court can be responsible for the decision, or (2) the trial judge is in a better position to make the decision because he or she can observe the parties." Kunsch,

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[16] Aside from trying to distinguish *Folsom*, Collins argues that applying the de novo standard of review to the timeliness of summary judgment affidavits would create an incongruity with the standard of review for motions to continue summary judgment under CR 56(f). *See* Keck Pet. for Rev., at 17-18 (citing *Pitzer v. Union Bank of Cal.*, 141 Wn. 2d 539, 556, 9 P.3d 805 (2000)). In *Pitzer*, the Court stated "[w]e review a trial court's denial of a CR 56(f) motion for abuse of discretion," without acknowledging *Folsom*. 141 Wn. 2d at 556 (brackets added). The *Pitzer* case arose before *Folsom*, even though the opinion was issued afterward, and the parties assumed that the abuse of discretion standard of review governed the case. *See* Appellant's Opening Brief, at 49-50, *Pitzer v. Union Bank of California*, Wn. S. Ct. No. 67701-8, 1997 WL 33812678 (Apr. 30, 1997); Brief of Respondent, at 34-35, *Pitzer v. Union Bank of California*, Wn. S. Ct. No. 67701-8, 1997 WL 33812677 (July 17, 1997).

supra, at 35. These justifications are inapplicable to review of rulings regarding the timeliness of summary judgment affidavits. With respect to judicial economy, on appeal of a summary judgment order the appellate court still has to examine the same documentary record, including materials stricken by the lower court.[17] With respect to the relative competence of appellate and trial courts, the appellate court is just as capable of reading the relevant documents as the trial court.[18] Accordingly, there is no good reason for applying the abuse of discretion standard of review to rulings regarding the timeliness of summary judgment affidavits.[19]

In light of the foregoing, the superior court's decision to strike the third affidavit of Dr. Li should be reviewed de novo. The Court of Appeals properly applied this standard of review in concluding that the superior court erred in striking the affidavit. *See Keck*, 181 Wn. App. at 85-86 &

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[17] *See* CR 56(c) (indicating summary judgment is based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any"); RAP 9.12 (providing that summary judgment record includes "the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered"); *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009) (stating "materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration as is true of evidence that is removed from consideration by a jury; they remain in the record to be considered on appeal").

[18] *Cf. Marriage of Rideout*, 150 Wn. 2d 337, 351, 77 P.3d 1174 (2003) (recognizing "general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written submissions," subject to a "narrow exception" for review of finding of contempt of parenting plan).

[19] In keeping with this analysis, Court of Appeals cases applying the abuse of discretion standard of review to the timeliness of summary judgment affidavits should be disapproved. *See Keck*, 181 Wn. App. at 80 n.3 (collecting cases).

n.7.[20] There was no prejudice to Collins because, at the time of summary judgment, no discovery had been completed, and the discovery cutoff and dispositive motion deadlines in the superior court's scheduling order had not yet passed. *See id.* at 85; *see also* CP 32; RP 16:24-25. Furthermore:

> Appellants' [i.e., Keck's] counsel acted in good faith when obtaining Dr. Li's first and second affidavits before the deadline, even though appellants' counsel lacked the time and attention needed to ensure the affidavits provided enough specificity to show a genuine issue of material fact exists on negligence. Although appellants' counsel believed the affidavits supplied sufficient facts, he ultimately needed Dr. Li's third affidavit to substantiate his previously stated opinions with more specific facts. The third affidavit stated no new opinions. We accept that the demands of the Ephrata trial were outside the reasonable control of appellants' counsel. And, the delay in filing the third affidavit reflects no professional incompetence or complete lack of diligence by appellants' counsel. Appellants' counsel gave verifiable, not easily manufactured reasons for the delay. The situation was not readily foreseeable because (1) respondents' [i.e., Collins'] counsel did not coordinate the summary judgment hearing with appellants' counsel, even though Dr. Chad's counsel was in trial with appellants' counsel, and (2) once appellants' counsel obtained Dr. Li's first and second affidavits, he had a reasonably debatable legal reason for thinking they were sufficient to defeat respondents' summary judgment motion, an argument he vigorously maintains on appeal.

Keck, 181 Wn. App. at 86 (brackets added).

[20] The Court of Appeals analyzed timeliness under CR 5(d)(2) and 6(b)(2), but CR 56(e), which allows "affidavits to be supplemented ... by ... further affidavits," seems equally applicable. *See Keck*, 181 Wn. App. at 83-84 & n.6. The result should be the same under each applicable rule.

C.) The Court should not require greater specificity in expert affidavits submitted in opposition to summary judgment in medical negligence cases than is necessary to be admissible or support a verdict at trial.

Summary judgment should be denied if there are genuine issues of material fact for trial. CR 56(e). Materiality is determined under the governing substantive law. *See Rossiter v. Moore,* 59 Wn. 2d 722, 724, 370 P.2d 250 (1962). In a medical negligence claim, the material facts that the plaintiff is obligated to prove are:

> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

RCW 7.70.040. Expert medical testimony is generally required to establish the applicable standard of care and causation. *See Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn. 2d 438, 449, 663 P.2d 113 (1983).

Summary judgment affidavits must "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein." CR 56(e). A person who is qualified as an expert "may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts

or data," unless requested by the judge or on cross examination. ER 705. Expert "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704 (brackets added). In light of the governing substantive law and applicable evidence rules, an affidavit from a qualified expert stating that the defendant breached the standard of care and caused the plaintiff's injuries should suffice to withstand summary judgment, and nothing more should be required.

All of Dr. Li's affidavits satisfy these requirements. There is no dispute as to his qualifications or the foundation for his opinions, and he clearly testified that Collins breached the standard of care and caused Keck's injuries. CP 43 (first affidavit, ¶¶ 5-7); CP 48 (second affidavit, ¶¶ 5-7); CP 82-83 (third affidavit, ¶¶ 15-16); CP 260-61 (fourth affidavit, ¶¶ 9-10). However, in reliance on *Guile*, the superior court and Court of Appeals below concluded that the first two affidavits of Dr. Li were insufficient. In this way, both lower courts have imposed a further requirement on expert affidavits submitted in opposition to summary judgment in medical negligence cases, beyond those required under the governing substantive law and the evidence rules. Specifically, they require an additional—albeit unquantified—amount of factual detail in

order for the affidavits to be deemed sufficient to avoid summary judgment.[21]

Thus, *Guile* dismissed a medical negligence claim arising from a gynecological surgery, notwithstanding the following testimony from a medical expert:

> Mrs. Guile suffered an unusual amount of post-operative pain, developed a painful perineal abscess, and was then unable to engage in coitus because her vagina was closed too tight. All of this was caused by faulty technique on the part of the first surgeon, Dr. Crealock. In my opinion he failed to exercise that degree of care, skill, and learning expected of a reasonably prudent surgeon at that time in the State of Washington, acting in the same or similar circumstances.

70 Wn. App. at 26. Similarly, after summarizing portions of Keck's medical records, the first two affidavits of Dr. Li state in pertinent part:

> 5. The surgeons [i.e., Collins] performed multiple operations without really addressing the problem of non-union and infection [in Keck's jaw] within the standard of care.
>
> 6. With regards to referring Ms. Keck for follow up care, the records establish that the surgeons were sending Ms. Keck to a general dentist as opposed to an oral surgeon or even a plastic surgeon or an Ear, Nose and Throat doctor. Again, this did not meet with the standard of care as the general dentist would not have had sufficient training or knowledge to deal with Ms. Keck's non-union and the developing infection/osteomyelitis.

[21] In answer to Keck's cross petition for review, Collins argues that the challenge to *Guile* has not been preserved because she did not argue that the case should be overruled in the superior court. *See* Collins Ans. to Cross Pet. for Rev., at 2. This argument confuses preservation of an *issue* for review with the development of an *argument* on review. *See State v. Miller,* 156 Wn.2d 23, 32 n.5, 123 P.3d 827 (2005) (making same distinction). Keck has always argued that the first two affidavits of Dr. Li are sufficient, and the challenge to the superior court's and Court of Appeal's reliance on *Guile* is simply the development of that argument.

> 7. The standard of care violations as outlined herein were the proximate cause of Ms. Keck's injuries and/or ongoing problems.

CP 48 (second affidavit; brackets added); *accord* CP 43 (first affidavit); *compare* CP 82-83 (third affidavit). The expert testimony in *Guile* and the first two affidavits from Dr. Li should have been sufficient under the governing substantive law and evidence rules.

The decision in *Guile* seems to derive from the language of CR 56(e), requiring affidavits to "set forth specific facts showing that there is a genuine issue for trial." However, in context this phrase is juxtaposed with "such facts as would be admissible in evidence" and contrasted with "mere allegations or denials." CR 56(e). Furthermore, the "specific facts" language does not purport to alter upon the concept of materiality, by which a genuine issue for trial is determined. *See* CR 56(c). To the extent that it ignores the relevant context, *Guile*'s reading of CR 56 is untenable.

The effect of *Guile* is to require greater specificity in an expert's summary judgment affidavit to avoid summary judgment than is necessary to admit the expert's testimony at trial or support a verdict in the plaintiff's favor, potentially preventing meritorious cases from reaching the jury. The effect is magnified in the typical case, such as this one,

where *Guile* is cited in support of an early summary judgment motion, and the plaintiff is obligated to provide responsive expert affidavits containing extensive factual detail before discovery has been completed. This is contrary to the purpose of summary judgment and violates the right to trial by jury. *See Keck,* 181 Wn. App. at 86-87 (noting the purpose of summary judgment is to avoid useless trial rather than cut litigants off from their right to trial by jury); *LaMon v. Butler,* 112 Wn. 2d 193, 199 n.5, 770 P.2d 1027 (1989) (indicating that summary judgment is constitutional only because it does not infringe upon the right to trial by jury). The *Guile* standard for expert affidavits submitted in opposition to summary judgment in medical negligence cases should be disapproved.[22]

IV.) CONCLUSION

Keck asks the Court to affirm the Court of Appeals with respect to the issues raised in the petition for review, involving the standard of review for rulings regarding the timeliness of summary judgment affidavits; to reverse the Court of Appeals with respect to the issue raised in the cross petition, regarding the standard for evaluating the sufficiency of summary judgment affidavits; and to remand this case for trial.

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[22] This Court's citation of *Guile* in *Stewart Graves v. Vaughn,* 162 Wn. 2d 115, 138, 170 P.3d 1151 (2007), does not elevate the case to the level of binding precedent. *See* Keck Reply Br., at 14-17 (discussing citation of *Guile* in *Stewart-Graves*). It appears that none of the reported cases citing *Guile* for the relevant proposition need to be disapproved. *See* Keck App. Br., at 25 n.8 (discussing cases citing *Guile*).

Submitted this 7th day of November, 2014.

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Attorneys for Respondents/Cross-Petitioners

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On November 7, 2014, I served the document to which this is annexed by email and/or First Class Mail, postage prepaid, as follows:

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Signed at Ephrata, Washington this 7th day of November, 2014.

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Please accept for filing the attached Supplemental Brief of Respondents/Cross Petitioners.

Thank you.

--
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